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Supreme Court of the United States

October Term, 1931

No. 263

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Petitioner,

vs.

CLARENCE BEZUE.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, NINTH DISTRICT, AND BRIEF IN SUPPORT THEREOF.

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Supreme Court of the United States

October Term, 1931

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, *Petitioner,* vs. CLARENCE BEZUE.	No.

PETITION FOR WRIT OF CERTIORARI

May it Please the Court:

The petition of The New York, New Haven and Hartford Railroad Company respectfully shows to this Honorable Court:

A. Summary Statement of the Matter Involved

This is an action for personal injuries brought under the Federal Employers' Liability Act (Act of Cong. April 22, 1908, c. 149, §1, 35 Stat. 65, and Act of April 5, 1910, c. 143, §1, 36 Stat. 291). The issues came on for trial before a Judge and jury in the Supreme Court, Putnam County, New York, on September 4th, October 2nd, 3rd, 9th and 10th, 1930, and resulted in a verdict in favor

of the plaintiff and against the defendant in the sum of $60,000 (R. 1, 453). The Appellate Division of the Supreme Court, Second Department, reversed the judgment and order upon the law and the facts and granted a new trial, unless plaintiff stipulated to reduce the verdict to the sum of $50,000, otherwise the judgment as modified and the order were unanimously affirmed, 232 N. Y. App. Div. 840. Plaintiff so stipulated (R. 1, 503-507). Thereafter defendant appealed as of right to the Court of Appeals from the judgment in favor of the plaintiff, which judgment reduced and modified the verdict, and also from the order of the Appellate Division modifying and reducing the judgment (R. 501, 502). The Court of Appeals has handed down a decision affirming the said judgment (257 N. Y. 480; R. 520, 521), and made a judgment and order of affirmance dated June 2nd, 1931 (R. 520, 521).

Plaintiff had been in the employ of the New Haven Railroad Company for nearly a year prior to the accident on September 2nd, 1929; for the first eight or nine months as an engine-wiper, working inside and outside of the roundhouse at Maybrook, New York (R. 144, 145). For three or four months prior to the accident he was classified as a truck operator, under the labor foreman, in the unskilled labor gang (R. 175). Defendant's Exhibit A, opposite page 470, shows the kind of truck he operated (R. 176). It was used for various purposes in the vicinity of the engine-house, and the crane was used for lifting (R. 279-281).

Some of the unskilled labor handled wheels, put things in position for mechanics, dumped coal, operated coal pockets; ran turntables, cleaned windows (R. 335). Plaintiff

himself was principally engaged in keeping locomotives in good repair. Occasionally he carried driving rods on the electric truck, removed and replaced engine brackets, removed pumps, assisted in removing and replacing cylinder heads on engines, assisted in moving side and main rods of engines to and from the machine shop, handled heavy materials for engines, took springs to them, assisted in removing and replacing cylinder pistons, and removing and replacing rails at drop pits (R. 190-194). "I never knew what I was going to do from one moment to the next" (R. 194). Sometimes his work was confined to locomotives in for only a few hours, at other times to locomotives in for two or three days (R. 145, 146, 151). He almost always worked with the electric crane, used for both light and heavy work (R. 145-151, 190-198, 233, 234, 175-179, 157, 277-281). He helped around the engines with a truck, lifted castings, pulled down grease boxes, put grease into the engines. He oiled springs, fixed draw-bars, changed pumps, often engaged in small jobs (R. 146, 151). At times he would take off driving wheels and do other heavy work (R. 277-281; for further details of his general work see 147-151, 190-194, 233, 234).

At Maybrook the railroad had a roundhouse with three sub-divisions, twenty-seven tracks, and a turntable in front (Defendant's Exhibit C, opposite page 472, R. 177-179, 331, 266). The roundhouse had pits in each subdivision. In addition to the roundhouse and turntable was the so-called Whiting Hoist Building with lathes, a hoist, four tracks, tool room and electrical shop (Defendant's Exhibit D, opposite page 474, R. 327-329). There were also a carpenter shop building (Defendant's Exhibit J, opposite page 482, R. 328-330); and a machine shop room (Defendant's Ex-

hibit L, opposite page 488, R. 267, 424). It is obvious that this Maybrook Terminal was not merely a place of lay over for engines, but also a place of repair. Exclusive of inspectors there were 193 men at the roundhouse (R. 424). In passing it may be noted that some of the side rods of engine 3221, with which we are particularly concerned, were taken to the above machine shop room (R. 425).

When in use most of the engines coming in and going out of the Maybrook Terminal were engaged in interstate commerce (R. 145, 148, 149, 267, 280, 299, 335, 336, 313, 314). Some of the engines were engaged in passenger service in the State of New York (R. 280). While most of the engines had a designated run, engine 3221 did not. From August 10th to 23rd, 1929, it had different departure times between Maybrook and New Haven, sometimes ran between Maybrook and East Hartford; and we find the same indefiniteness for the period September 4th to September 18th, 1929 (R. 148, 149, Plaintiff's Exhibit 15-B, opposite page 466; R. 273, 294, Plaintiff's Exhibit 15-A, opposite page 464). During both these periods it was engaged in interstate commerce; and it had been so engaged, when in use, from September 3rd, 1927, to August 10th, 1929 (R. 289, 270, Plaintiff's Exhibit 15-B, opposite page 466).

All engines operating in New York undergo a boiler wash every thirty days, and also a thirty-day inspection (R. 270). Certain repairs are attended to at this time. The evidence would seem to divide repairs into three classes—minor repairs that could be made between runs, repairs taking a longer time that could not be made between runs and were attended to at the boiler wash and inspection period, and classified repairs made after the

engine had gone approximately 35,000 miles, or about every eighteen months. These last repairs were made at Readville, Mass. (R. 337-340, 245, 288).

Engine 3221 arrived at Maybrook on August 23rd, 1929, and left on September 4th—a period of twelve days. It underwent a thirty-day boiler wash and a thirty-day inspection at that time (R. 270). The accident occurred on September 2nd (R. 271, 272). During this twelve-day period the main driving wheels of this engine were removed, and the journal turned, the latter task involving eight to ten hours of labor (R. 181, 341). Several parts of the engine were taken to the machine shop, the jacket over the fire box taken off, and the fire dumped (R. 282-284). Without these wheels the engine could not move on its own power (R. 336). Defendant's Exhibit I, consisting of three pages, opposite page 480, shows the work done (R. 285). Item 8 on page 3 of this Exhibit would take two men a period of five days (R. 322, 323). Items 26 to 35 on page 2 of Exhibit I would take two men 32 hours (R. 324-326). Skilled labor was performed on all days of the period except August 24th and 25th (R. 334, 335).

On the day in question plaintiff went on duty at 8 o'clock in the morning, and the accident occurred at 11 or 11:30. During the early morning he had operated the truck but that is all we know (R. 177). The tasks for the rest of the day had not yet been assigned (R. 194). Two hours or more prior to the accident he was asked to assist in moving the main pair of driving wheels of engine 3221 (R. 182, 183). He assisted in removing the block from the lathe, and in rolling the wheels from the Whiting Hoist Building to a switch, a distance of 619 feet, and from the

switch to the place of the accident, a distance of 1062 feet (R. 331).

This pair of driving wheels had been taken from engine 3221 in the roundhouse, to the back shop or Whiting Hoist Building, and there repaired (R. 152, 153, 186, 283). They were the main driving wheels of the engine, probably weighing ten or twelve tons, admittedly very heavy (R. 180, 181). Plaintiff and other men brought the truck to the back shop, and plaintiff removed a block out of the lathe, others removing the wheels from the lathe with the aid of a crane (R. 183, 184). These men, including plaintiff, then rolled the wheels by hand out of the shop, up the track to the switch, back on the main line leading to the turntable, and placed them on the turntable (R. 152). The turntable lined the wheels up with a track next to the track they were to be placed upon (R. 154). Plaintiff and the other men then pushed the wheels off the turntable. They were then blocked (R. 154). The table was lined up with the next track in order to pull out an engine so as to get at 3221 (R. 154). While the men waited for the signal to move the wheels forward out on the turntable again the wheels started rolling backward, resulting in the accident to the plaintiff (R. 154-156). If the accident had not happened they would have been put on the turntable, the turntable lined up with the track, and the wheels moved off (R. 157).

This was a large freight engine of the Santa Fe type. The main driving wheels are indicated by an X on Defendant's Exhibit P, opposite page 496 (R. 269, 274, 293, 348, 349).

B. Reasons Relied On for the Allowance of the Writ

Petitioner respectfully contends that the writ of certiorari should be granted to review and reverse the judgment of the Court of Appeals of the State for the following reasons:

(1) The decisions of the Supreme Court of the State of New York, the Appellate Division of the Supreme Court, Second Department, and of the Court of Appeals holding that plaintiff was engaged in interstate commerce as a matter of law are not in accord with the applicable decisions of this Court, including *Ill. Cent. R. R.* v. *Behrens*, 233 U. S. 473; *Ill. Cent. R. R.* v. *Peery*, 242 U. S. 292; *Shanks* v. *Del., Lack. & West. R. R.*, 239 U. S. 556; *Minneapolis & St. Louis R. R. Co.* v. *Winters*, 242 U. S. 353; *Chicago, K. & S Ry. Co.* v. *Kindlesparker*, 246 U. S. 657; *Industrial Commission* v. *Davis*, 259 U. S. 182.

(2) If it can be said that the decisions in this case are not contrary to applicable decisions of this Court, it must then be said they decide a federal question of substance and importance, not heretofore determined by this Court, and it is in the public interest to have that question decided by this Court.

(3) The intimation in *Erie R. R. Co.* v. *Collins*, 253 U. S. 77, as to abrupt transition, with no interval between duties, should not govern this case. It has no application to a fact situation involving a task of at least two hours' detailed, peculiar labor.

(4) Further "accurate delimitation" is necessary, and

this case "has importance beyond the interest of the parties to it," and it will "make a test by which further cases may be assigned to intrastate or interstate commerce and mark the power and policies that may be necessary or convenient to either." *Phila. & Read. Ry. Co.* v. *DiDonato*, 256 U. S. 327.

(5) The Court of Appeals should have determined whether the engine had been withdrawn from service, such determination being a necessary part of the question. By refusing to consider the engine work, the status of the engine, the place of repairs, the extent of the repairs, the particular work at the particular time, the Court of Appeals has done one of two things: (1) Made a decision contrary to the applicable decisions of this Court; or (2) Laid down a new test not hitherto approved as a test by this Court.

(6) If this decision stands as authority the rights and obligations of many employees and many railroads will lack uniformity of administration.

(7) As the engine had not been designated to any particular commerce, and as it had been definitely withdrawn from any commerce, work in connection with it was not in interstate commerce.

(8) The general plant service of plaintiff should not give color to his particular work at the particular time.

(9) Plaintiff's work had one immediate objective at the time of the accident, but the Court of Appeals treated this objective as immaterial, and decided the question on a previous objective of general plant service, non-existent at the time of the accident. In so doing the Court of Appeals has

gone beyond the principles laid down by this Court as determining the question of interstate commerce.

(10) Your petitioner "expressly claimed immunity by reason of the act of Congress, and the highest Court of the State either decided or assumed that the records sufficiently presented a question of Federal right and decided against the party asserting that right." *Nor. Car. R. R. Co.* v. *Zachary*, 232 U. S. 248, 257.

11) There was evidence that at least was sufficient to go to the jury as to whether the case came within the Federal Employers' Liability Act.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of New York for the Ninth District, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 3-328, Clarence Bezue, plaintiff-respondent, against The New York, New Haven and Hartford Railroad Company, defendant-appellant, and that the said order and judgment of the Court of Appeals may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

By JOHN M. GIBBONS,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Petitioner,
vs.
CLARENCE BEZUE.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

The Opinions of the Courts Below

The opinion in the Court of Appeals is reported in *Bezue v. The New York, New Haven and Hartford Railroad Company,* 257 N. Y. 480, decided June 2, 1931 (R. 511-519).

The opinion in the Appellate Division, Second Department, is reported in 232 N. Y. App. Div. 840 (R. 508).

The Trial Court wrote no opinion (R. 500).

II

Jurisdiction

(1) The jurisdiction of this Court is invoked under the Federal Employers' Liability Act (Act of Cong. April 22,

1908, c. 149, §1, 35 Stat. 65, and Act of April 5, 1910, c. 143, §1, 36 Stat. 291).

The jurisdiction is also invoked under Judicial Code, §237, as amended by Act of Congress, September 6, 1916, c. 448, §2, 39 Stat. 726, and Act of February 13, 1925, c. 229, §1, 43 Stat. 937.

(2) The date of the judgment to be reviewed is June the 2nd, 1931 (R. 520, 521).

(3) This case was tried and decided by the state courts under the Federal Employers' Liability Act, the complaint alleging interstate commerce, and the answer denying it (R. 12-16). The judgment was rendered for the plaintiff in the sum of $60,222.50 (R. 23, 24). Petitioner appealed from the judgment to the Appellate Division of the Supreme Court, Second Judicial Department (R. 2, 3). That Court reversed the judgment and order, and directed a new trial unless plaintiff stipulated to reduce the verdict to the sum of $50,000, in which event the judgment as so modified, and the order, were unanimously affirmed (R. 503, 504). Plaintiff consented to such reduction (R. 507), and thereupon plaintiff appealed to the Court of Appeals (R. 501, 502), which Court affirmed the judgment (R. 520, 521), two of the Judges dissenting. Thereupon the judgment and order of the Court of Appeals (dated June 2, 1931) was made the judgment and order of the Supreme Court on the 9th day of June, 1931 (R. 522, 523), and judgment was entered on the remittitur of the Court of Appeals on the 10th day of June, 1931 (R. 524, 525).

(4) The cases believed to sustain the jurisdiction of this Court are:

St. L. & Iron Mtn. Ry. v. McWhirter, 229 U. S. 265, 275-277;

Seaboard Air Line v. *Horton*, 223 U. S. 492, 497, 499;

Chi. & Rock Island R. R. v. *Devine*, 239 U. S. 52, 54.

III

Statement of the Case

A full statement of the case has been given under heading "A" in the petition and in the interest of brevity the statement is not repeated at this point.

IV

Specification of Errors

(1) The trial court erred in denying petitioner's motion, made at the end of plaintiff's case, to dismiss the complaint on the ground that he had failed to prove interstate commerce, had failed to prove that he came under the Federal Employers' Liability Act at the time and place of the accident, that the evidence showed he was not engaged in such commerce at such time and place, that the engine had been withdrawn from service, that he was engaged in repair work with that engine at that time, that he was not engaged in commerce or movement in any way (R. 314-316).

(2) The trial court erred in finding and holding that the engine was an instrumentality of interstate commerce, that it was not withdrawn from the service, but that round-

house repairs were being made, and that during that time it continued in the service and was an instrumentality of interstate commerce, and the plaintiff at the time was engaged in interstate commerce work upon an instrumentality of interstate commerce that had not been permanently withdrawn from the service (R. 315, 316).

(3) The trial court erred in denying petitioner's motion for the direction of a verdict in its favor, made at the end of the entire case, on the ground of failure of proof that plaintiff was engaged in interstate commerce (R. 431, 432).

(4) The trial court erred in denying defendant's motion to go to the jury on the question of interstate commerce (R. 431).

(5) The trial court erred in its charge to the jury wherein it said that the plaintiff and defendant, as a matter of law, were engaged in interstate commerce, and plaintiff was entitled to the benefit of the Federal Employers' Liability Act (R. 434).

(6) The trial court erred in denying defendant's motion to set aside the verdict and for a new trial upon the exceptions in the judge's minutes, that the verdict was contrary to the evidence, contrary to the law, and on the further ground of the exceptions taken to the ruling on the question of interstate commerce (R. 453, 454).

(7) The Court of Appeals erred in holding that plaintiff was engaged in interstate commerce.

V

Argument

Summary of the Argument

Point A. The evidence did not justify the ruling of law made that the plaintiff was engaged in interstate commerce within the meaning of the Federal Employers' Liability Act.

Point B. At the most plaintiff presented a fact question that should have been submitted to the jury.

POINT A

The evidence did not justify the ruling of law made that the plaintiff was engaged in interstate commerce within the meaning of the Federal Employers' Liability Act.

The prevailing opinion of the Court of Appeals proceeds on the theory that the roundhouse was an essential part of the railroad's system, and that the respondent was engaged in a plant service (R., 513). The Court reaches the conclusion that this was employment in the maintenance of the roundhouse which was a necessary part of the plant, essential in the railroad business of carrying on interstate commerce (R., 516). The dissenting opinion of Judge O'Brien says that his energies were directed to an object which was not an instrument of commerce, and that the character of his employment on other occasions was immaterial (R., 518, 519). The majority opinion finds it unnecessary to determine whether at the time of the accident the

locomotive being repaired had been so withdrawn from service that it was not in use in interstate commerce (R., 560.)

The test, as we have always understood it, is the particular service or task at the particular time. *Ill. Cent R. R.* v. *Behrens,* 233 U. S. 473. What the employment is on other occasions, even the usual work, becomes immaterial. *Shanks* v. *Del. & Lac. R. R.,* 239 U. S. 556; see also *St. L. & San Francisco Ry.* v. *Seale,* 229 U. S. 156. One job should not be subordinated to another job. *Ill. Cent. R. R.* v. *Peery,* 242 U. S. 292. It is true the task or service will not be subdivided into the particular acts which comprise it, but will be viewed as a unit in the light of its purpose. *N. Y. Central R. R.* v. *Carr,* 238 U. S. 260; *Louisville & Nashville R. R. Co.* v. *Parker,* 242 U. S. 13. But "service", as used by this Court, has always referred to the immediate task at hand; there has been no hesitancy in splitting up a day's work. *Ill Cent. R. R.* v. *Behrens, supra; Illinois Cent. R. R.* v. *Peery, supra; Southern Railway Co.* v. *Puckett,* 244 U. S. 571; see *N. Y. Central R. R.* v. *Carr, supra,* at page 262. Other courts have so understood. *Onley* v. *Lehigh V. Ry. Co.,* 36 F. (2d) 705 (C. C. A. 2d), cert. denied, 281 U. S. 743; *Boyle* v. *Pennsylvania R. Co.,* 228 Fed. 266 (C. C. A. 3d); *Sullivan* v. *N. Y. N. H. & H. R. R. Co.,* 105 Conn. 122, cert. denied, 273 U. S. 754. The Court of Appeals has given the term a broader meaning, using it as a synonym for general employment. Gramatically, of course, this is permissible; one may even speak of all railroad employees as engaged in "railroad service". But the word has become definitely connected with the interpretation of the Act by sanction from this Court. And the decision sought to be reviewed involves such an enlargement

of its connotation in this connection, as materially to broaden the scope and application of the federal statute. It may be that this is a correct prediction of the future development of the law. If so, this is a matter to be pronounced upon by this Court. Although this Court has, since the enactment of the statute, laid down general tests for determining interstate commerce, we can find no near approach, in its several decisions, to the far-reaching principle announced here by the Court of Appeals.

We submit that to call plaintiff's work "plant service" is mere verbalization. He was doing nothing with reference to the maintenance, repair, or construction of the plant. Probably his general employment was sometimes in interstate commerce, sometimes not. But even assuming continuous general interstate work up to the day of the accident the decisions of this Court compel consideration of the particular work at the time. If the particular service is in conflict with the general work the Court of Appeals should have disregarded the general work, instead of doing which it disregarded the particular service which lasted at least two hours and was definite as to instruction, kind, place.

The state court should have inquired into the question whether the particular engine had been withdrawn from commerce. In *Minneapolis & St. Louis R. R. Co.* v. *Winters*, 242 U. S. 353, the period of withdrawal was three days. Curiously enough in *Conklin* v. *N. Y. C. R. R. Co.*, 238 N. Y. 570, cert. denied, 266 U. S. 607, the period of withdrawal was five days, in *Leslie* v. *Long Island Co.*, 248 N. Y. 511, the period of withdrawal was a few hours; and in *Morini* v. *Erie R. R. Co.*, 253 N. Y. 539, the period of withdrawal

was but a day, and yet the Court of Appeals considered the particular car and held it to be withdrawn from commerce.

Even though the use of the engine was exclusively interstate it may be withdrawn from commrece. *Chicago, K. & S. Ry. Co.*, v. *Kindlesparker*, 246 U. S. 657; *Industrial Commission* v. *Davis*, 259 U. S. 182.

As authority for failure to determine whether at the time of the accident the locomotive being repaired had been withdrawn from interstate commerce the majority opinion of the Court of Appeals refers to, among other cases, *Erie R. R. Co.* v. *Collins*, 253 U. S 77; *Pedersen* v. *Del., Lack. & West. R. R.*, 229 U. S. 146; *Shanks* v. *Del., Lack & West. R. R., supra; New York Cent. R. Co.* v. *Marcone*, 281 U S. 345; *Erie R. R. Co.* v. *Szary*, 253 U. S. 86. The dissenting opinion says that such decisions are readily distinguishable because the workmen at the time of their injuries were employed in duties directly affecting both interstate and intrastate transportation (R. 519).

We had supposed that the time element is the time of the injury (*Shanks* v. *Del., Lack. & West. R. R., supra*); that the service is the particular service or task when the injury occurred (*Ill. Cent. R. R.* v. *Behrens, supra*); that that service or task is the work in question (*Pedersen* v. *Del., Lack. & West. R. R., supra*).

In the case at bar there was no direct or immediate connection with previous acts. The particular act was the whole work for at least two hours, gave character to the work then being performed. Plaintiff's rank or title or previous job is immaterial. *Southern Railway Co.* v.

Puckett, supra. Certainly he was not engaged, throughout the days, in a single and indivisible task, and what he did on the day of the accident, prior to the two hour period, is vague. Nor have we the case of an employee going to or from work, discharging a duty of his employment which partakes of the character of the work as a whole. *Erie R. R. Co.* v. *Winfield,* 244 U. S. 170, 173. The plaintiff was not merely upon the premises, on duty but not performing any particular service at the time. *Nor. Car. R. Co.* v. *Zachary,* 232 U. S. 248; *Erie R. R. Co.* v. *Szary, supra; New York Cent. R. Co.* v. *Marcone, supra.*

In *Erie R. R. Co.* v. *Collins, supra,* this Court found both the instrumentalities and employments gave interstate color to the work. In *Erie R. R. Co.* v. *Szary, supra,* the plaintiff prepared sand for immediate use by engines, some of which were engaged in interstate commerce. We find nothing said by this Court that serves as a basis for the point of view adopted by the Court of Appeals, with its utter disregard of particular service at the particular time, its express refusal to consider that phase of the problem.

The judgment of the Court of Appeals is not in accord with the applicable decisions of this Court, at any rate, it decides a federal question of substance and importance not heretofore determined by this Court.

The decision affects many thousands of railroad employees engaged in so-called "plant" work. Although not unanimous, because of the high standing of the Court of Appeals of the State of New York it will have great influence throughout the country. After all these years and

many pronouncements we still have an interstate question which, we respectfully submit, fully deserves adjudication by this Court.

POINT B

At the most plaintiff presented a fact question that should have been submitted to the jury.

Even where substantial contradiction was doubtful this Court approved submission of a case to the jury. *Nor. Car. R. R. Co.* v. *Zachary, supra,* at p. 261. Please see also *Penna. Co.* v. *Donat,* 239 U. S. 50, 52; *Southern Railway* v. *Lloyd,* 239 U. S. 496, and cases cited; *Louisville & Nashville R. R. Co.* v. *Parker, supra.* An issue is one for the jury's determination if different inferences can be drawn by reasonable men from the facts concerning it, even where the facts themselves are not in dispute. *Richmond & Danville Railroad* v. *Powers,* 149 U. S. 43; *Boston Elevated Ry. Co.* v. *Teele,* 248 Fed. 424 (C.C.A. 1st); *Wisconsin & Arkansas Lumber Co.* v. *Day,* 35 F. (2d) 563 (C.C.A. 8th). Petitioner adequately raised this question (R. 431).

While all the state judges dealt with the problem as one of law, apparently the trial judge and the five judges in the Appellate Division considered engine status as material, five in the Court of Appeals as immaterial and two in the Court of Appeals concluded plaintiff was not engaged in interstate commerce.

CONCLUSION

It is, therefore, respectfully submitted that this case is
calling for the exercise by this Court of its supervisory powers,
order that the judgment of the Court of Appeals of the State
New York may be reversed and that to such an end a writ of c
tiorari should be granted and this Court should review the decis
of the Court of Appeals and finally reverse it.

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